

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number _____

Meeting Type: Regular

Meeting Date: 9/27/2012

Action Requested By:
Legal

Agenda Item Type
Resolution

Subject Matter:

Bridge Street Development

Exact Wording for the Agenda:

Resolution authorizing the Mayor to execute a Development Agreement between the City of Huntsville and IMI Huntsville, LLC, for the Bridge Street Development.

Note: If amendment, please state title and number of the original

Item to be considered for: Action

Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what Council action will provide, allow and accomplish and; any other information that might be helpful.

Associated Cost:

Budgeted Item: Not applicable

MAYOR RECOMMENDS OR CONCURS: Yes

Department Head: _____ Date: _____

RESOLUTION NO. 12-_____

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Mayor be, and he is hereby authorized to enter into a Development Agreement by and between the City of Huntsville and IMI Huntsville, LLC, on behalf of the City of Huntsville, a municipal corporation in the State of Alabama, which said agreement is substantially in words and figures similar to that certain document attached hereto and identified as "Development Agreement between the City of Huntsville and IMI Huntsville, LLC," consisting of twenty-seven(27) pages and the date of September 27, 2012, appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council, an executed copy of said document being permanently kept on file in the Office of the City Clerk-Treasurer of the City of Huntsville, Alabama.

ADOPTED this the 27th day of September, 2012.

President of the City Council of
the City of Huntsville, Alabama

APPROVED this the 27th day of September, 2012.

Mayor of the City of
Huntsville, Alabama

DEVELOPMENT AGREEMENT

by and between
THE CITY OF HUNTSVILLE
and
IMI HUNTSVILLE, LLC

Dated: _____, 2012

DEVELOPMENT AGREEMENT

This Development Agreement (this "Agreement") is made and entered into on and as of this _____ day of _____, 2012 (the "Effective Date"), by and between The City of Huntsville, a municipal corporation under the laws of the State of Alabama (the "City"), and IMI Huntsville, LLC, a Delaware limited liability company ("Developer").

W I T N E S S E T H

WHEREAS, Developer is the owner of the approximately 100 acre retail and mixed-use development located in Huntsville, Alabama and known as "Bridge Street Towne Centre" (the "Project"); and

WHEREAS, the City has determined that demand currently exists, and over the reasonably foreseeable future such demand will increase, for additional retail enterprises within and around the Project; and

WHEREAS, Developer has approached the City with a proposal for development of a new phase of the Project which will include additional retail enterprises within the Project, and is also contemplating future plans for a potential second new phase (each, a "Phase", and collectively, the "Phases"), which such Phases are herein more particularly described and referenced as "Phase III" and "Phase IV" of the Project; and

WHEREAS, Developer has reported to the City that it has negotiated and is in the process of finalizing and executing a lease agreement with a national or regional department store retailer for the Department Store (hereinafter defined), which Department Store will comprise a majority of the square footage of Phase III; and

WHEREAS, the City has determined that the Project is situated in an area important for economic development, and that Phase III will inure to the benefit of the City and its citizens by, among other things, (i) expanding the tax base of the City by attracting to the Project general commercial activity and development, (ii) attracting to the Research Park area individuals who desire to live and shop in an urban setting, (iii) facilitating the development of other portions of the Research Park area located in the vicinity of the Project, (iv) expanding employment opportunities within and surrounding the Project site, and (v) enhancing the overall quality of life for the citizens of the City; and

WHEREAS, development of Phase III will require certain public infrastructure improvements within and around the site of the Project including, without limitation, the City Work hereinafter defined.

NOW THEREFORE, in consideration of the premises, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

ARTICLE I DEFINITIONS

1.1 **Defined Terms.** Each reference in this Agreement to any of the following terms shall have the meaning set forth below for each such term:

"Affiliate" means any Person directly or indirectly Controlling, Controlled by or under Common Control with the Developer.

"Certificate of Substantial Completion" means a certificate of an architect or engineer reasonably satisfactory to the City evidencing completion of the construction of that portion of the Project described in the certificate, less and except completion of punch list items, and, further, providing that construction has been completed such that said portion of the Project enjoys permanent utility access.

"City Application Fees" means standard, usual and customary fees levied or assessed by the City to review and process applications for City Approvals.

"City Approvals" means standard, usual and customary permits or approvals required under City Regulations in order to develop, use and operate the Project.

"City Caused Overruns" shall have the meaning given to such term in Section 2.5(f) hereof.

"City Council" means the City Council of the City or its designee.

"City Development Fees" means fees or assessments, other than City Application Fees, charged or required by the City in connection with any City Approval: (a) to defray, offset or otherwise cover the cost of public services, improvements or facilities; or (b) that are imposed for a public purpose.

"City Obligations" means the City Work set forth and described on Exhibit C hereto, along with the other City payment and performance obligations set forth in this Agreement.

"City Regulations" means the Zoning Ordinance and all other ordinances, resolutions, codes, rules, regulations and policies of the City in effect as of the time in question.

"City Work" means those items set forth on Exhibit C hereto.

"Common Control" means that two Persons are both controlled by the same other Person.

"Construction Codes and Standards" means the City Regulations pertaining to or imposing life safety, fire protection, mechanical, electrical and/or building integrity requirements with respect to the design and construction of buildings and improvements, including the then current applicable building codes.

"Contingency Fund" shall have the meaning given to such term in Section 2.5(c)(v) hereof.

"Control" means the ownership (direct or indirect) by one Person of an interest in the profits and capital and the right to manage and control the day to day affairs of another Person. The term "Control" includes any grammatical variation thereof, including "Controlled" and "Controlling".

"Department Store" shall have the meaning given to such term in Section 4.2(d)(i) hereof.

"Department Store Lease Agreement" means a fully executed and binding lease agreement between the Developer and a national or regional department store retailer respecting the Department Store, as contemplated in Section 4.2(a)(i) hereof.

"Developer City Work Prepayment Amount" shall have the meaning set forth in Section 2.5(c)(iv) hereof.

"Estimated Total Cost" shall have the meaning set forth in Section 2.5(c)(iv) hereof.

"Exaction" means (a) a requirement for the dedication of any portion of the property included in the Project to the City or any agency thereof, other than any dedication easement that may be required pursuant to Section 2.5(d) hereof, (b) an obligation for on-site or off-site improvements or construction of public improvements; (c) an obligation to provide services; or (d) the requirement to dedicate any easements, rights or privileges with respect to the Project or any portion thereof to the City or any agency thereof.

"Excess City Costs" shall have the meaning given to such term in Section 2.5(b) hereof.

"Governmental Agencies" means all governmental or quasi-governmental agencies (such as public utilities) having jurisdiction over, or the authority to regulate development of, the Project. As used in this Agreement, the term "Governmental Agencies" does not include the City or any of the departments of the City or the Design Control Committee of Cummings Research Park West (the "DCC").

"Governmental Agency Approvals" means all permits and approvals required by Governmental Agencies under Governmental Agency Regulations for construction, development, operation, use or occupancy of the Project.

"Governmental Agency Regulations" means the Laws, ordinances, resolutions, codes, rules, regulations and official policies of Governmental Agencies in effect as of the time in question.

"IFB" means an invitation for bids.

"Laws" means the Constitution and laws of the State of Alabama, the Constitution of the United States, and any federal, state, county or City ordinances, codes, statutes, regulations, or executive mandates, and any court decision, State or federal, with respect thereto.

"Letter of Credit" shall mean the letter of credit described in Article VII hereof.

"Parties" collectively means the City and the Developer (or the Developer's Permitted Transferees, as applicable, determined as of the time in question).

"Permitted Transferee" means a Transferee who has complied in all respects with the provisions of Article X of this Agreement.

"Person" means an individual, partnership, firm, association, corporation, trust, governmental agency, administrative tribunal or other form of business or legal entity.

"Phase III Completion Damages Amount" shall have the meaning given to such term in Section 4.2(c) hereof.

"Phase IV Covenant Term" shall have the meaning given to such term in Section 4.3(b) hereof.

"Phase III Site" means the real property more particularly described on Exhibit "A" attached hereto and incorporated herein by reference.

"Phase IV Site" means the real property more particularly described on Exhibit "B" attached hereto and incorporated herein by reference.

"Phase IV Site Development Covenants" shall have the meaning given to such term in Section 4.3(b) hereof.

"Phase IV Site Development Restrictions" shall have the meaning given to such term in Section 4.3(b) hereof.

"Planning Commission" means the Planning Commission of the City.

"Plans and Specifications" means the final plans and specifications to be used by the City to construct the City Work, as approved by Developer as provided herein, and as the same may be amended or modified, but subject to the terms of this Agreement.

"Project" means Bridge Street Towne Centre, together with the Phases.

"Restaurant" shall have the meaning given to such term in Section 4.2(a)(iii) hereof.

"Site Lake" shall have the meaning given to such term in Exhibit C.

"State" means the State of Alabama and any department or agency acting on behalf of the State.

"Technical City Permits" collectively means any of the following technical permits issued by the City or any office, board, commission, department, division or agency of the City in connection with any building or improvement in either Phase: (a) demolition, excavation and grading permits; (b) foundation permits; (c) permits for the installation of underground lines and facilities for utilities; and (d) any other similar permits. "Technical City Permits" specifically

excludes building permits from the City for the construction of particular buildings or improvements.

"Term" means the term of this Agreement, as determined pursuant to Article IX hereof, unless sooner Terminated as provided in this Agreement.

"Terminate" means the expiration of the Term of this Agreement, or any termination of this Agreement by any party entitled to do so by the express provisions of this Agreement. The term "Terminate" includes any grammatical variant thereof, including "Termination" or "Terminated".

"Transfer" means the sale, assignment (as collateral or otherwise), encumbrance, transfer or hypothecation by Developer of any of its rights, duties or obligations under this Agreement, which may be made only in accordance with the terms, standards and conditions of Article X of this Agreement. Transfers do not include (a) a dedication of any portion of a Phase to the City or a Governmental Agency; (b) any other leases, subleases, licenses and operating agreements entered into in the ordinary course of business by Developer with tenants, for occupancy of space in any buildings or improvements (together with any appurtenant tenant rights and controls customarily included in such leases or subleases), and any assignment or transfer of any such lease, sublease, license or operating agreement by either party thereto; or (d) a collateral assignment of Developer's rights under this Agreement to a Mortgagee providing financing with respect to such Developer's portion of such Phase.

"Transferee" means the Person to whom a Transfer is proposed in accordance with Article X of this Agreement.

"Western Portion of the Site Lake" shall mean that portion of the Site Lake starting at the west face of the existing pedestrian bridge structure and extending to the Westernmost portion of the Site Lake (which such portion is located primarily in front of the proposed location of the Department Store).

"Zoning Ordinance" means The Zoning Ordinance of the City of Huntsville, Alabama, in effect as of February 2005, except as amended to expand on permissible uses.

1.2 Certain Other Terms. Certain other terms shall have the meanings set forth for each such term in this Agreement.

ARTICLE II CITY WORK; CITY OBLIGATIONS AND OTHER PRELIMINARY MATTERS

2.1 General. In consideration of, and in reliance on, the covenants and commitments of the parties contained in this Agreement, the City will be unconditionally obligated to fulfill the City Obligations, but only in the manner and order set forth herein and only up to the sum of \$4,000,000, and the Developer will be unconditionally obligated to (i) complete the constructing, leasing and opening to the general public of Phase III pursuant to the provisions of and as set forth in Section 4.2(a) hereof, (ii) impose and record the Phase IV Site Development Covenants on the Phase IV Site, (iii) deliver and maintain the Letter of Credit, and (iv) cover all costs of the City Obligations in excess of \$4,000,000, all as more particularly set out herein.

2.2 [Reserved]

2.3 Designation of Coordinators. Each of the City and the Developer agree to designate one or more project coordinators to monitor and coordinate the acquisition, design, permitting, and construction of Phase III and the City Work in accordance with this Agreement.

2.4 Finalization of Plans and Specifications. Developer and the City will coordinate to the extent possible and cooperate with each other in connection with the finalization of the Plans and Specifications as promptly as possible after the Effective Date. Once the Plans and Specifications have been finalized and agreed upon by the City and the Developer, the same shall not be amended by the City in any material manner without Developer's prior written approval, which approval will not be unreasonably withheld.

2.5 Concerning the City Work. (a) In consideration of the agreement of the Developer as herein provided with respect to the development of Phase III and the recordation of the Phase IV Site Development Covenants, the City agrees that it will cover, whether in the form of out-of-pocket payments, waivers of fees and charges, allocations of costs of services provided by staff and resources of the City, or otherwise, not to exceed \$4,000,000 of the costs of the City Obligations. Developer agrees that it will timely pay and assume all such costs of the City Obligations in excess of \$4,000,000, as provided herein.

(b) In the event that the aggregate costs of performance of the City Obligations exceed \$4,000,000 (the amount of any such excess herein called the "Excess City Costs"), the City will provide notice of the same to the Developer with supporting information for such Excess City Costs as the same are incurred or are payable. City shall first utilize any amounts held on deposit in the Contingency Fund to pay any such Excess City Costs. To the extent amounts held on deposit in the Contingency Fund are not sufficient to pay such Excess City Costs, Developer shall remit the amount necessary for such Excess City Costs to the City within ten (10) calendar days of City's request therefor. Developer shall thereafter continue to be responsible for making additional deposits to the Contingency Fund for future Excess City Costs to the extent required by this Agreement.

(c) The City shall proceed with the development of the City Work after the Effective Date, in the following manner and order:

(i) As soon as practicable following the Effective Date, the City shall prepare the Plans and Specifications respecting the City Work and shall remit the same for approval by the Developer.

(ii) Following approval by the Developer of the Plans and Specifications, the Developer and the City shall cooperate and work with each other to prepare the IFB and related documentation for bidding of the City Work, all of which shall be subject to the reasonable approval of both the Developer and the City, and the Developer shall prepare at its sole cost and expense, and submit to the City for approval, the Phase IV Site Development Covenants as set forth in Section 4.3 hereof.

(iii) Upon (a) approval by the Developer and the City of the IFB respecting the City Work, (b) submission by the Developer to the City of the fully executed and enforceable Department Store Lease Agreement, (c) approval by the City of the Phase IV Site Development Covenants and recordation of the same by the Developer as set forth in Section 4.3 hereof, and (d) Developer's delivery to the City of the Letter of Credit, the City shall prepare and submit the IFB and related documentation for bidding of the City Work and shall commence and proceed with all other obligations of the City under this Agreement.

(iv) In the event that, based on bids submitted or otherwise, the product of 1.10 times the sum of (A) the total costs expended or incurred (whether in the form of out-of-pocket payments, waivers of fees and charges, allocations of costs of services provided by staff and resources of the City, or otherwise) by the City following the Effective Date but prior to the bid opening with respect to the City Obligations, (B) the total estimated cost of the City Work to be performed pursuant to the apparent winning bidder of the IFB, and (C) all other costs reasonably expected to be expended or incurred (whether in the form of out-of-pocket payments, waivers of fees and charges, allocations of costs of services provided by staff and resources of the City, or otherwise) by the City with respect to the City Obligations (the said product being herein called the "Estimated Total Cost"), exceeds \$4,000,000, then the Developer shall pay to the City the difference between the Estimated Total Cost and \$4,000,000 (said difference being herein called the "Developer City Work Prepayment Amount") in immediately available funds on the date that is not more than ten (10) calendar days following the City's determination of the Estimated Total Cost.

(v) In the event a Developer City Work Prepayment Amount is due and paid by Developer to City under this Agreement, the City agrees that the same shall be maintained in a separate fund or account of the City (the "Contingency Fund"), and such funds, together with any other amounts deposited into the Contingency Fund from time to time pursuant to this Agreement (including any interest earned thereon), shall be used by the City for no purposes other than payment of Excess City Costs actually incurred for which Developer is responsible under this Agreement (*i.e.*, Excess City Costs that are not City Caused Overruns). Upon reasonable request by Developer, the City shall provide a reasonable accounting regarding the use of any funds from the Contingency Fund and the City shall provide evidence of its maintenance of the segregated Contingency Fund as required above.

(vi) If, at any time during the development and construction of the City Work or the performance of the other City Obligations, the City reasonably determines that (a) the actual costs of the City Obligations will exceed the previously determined Estimated Total Cost and (b) the amount then held in the Contingency Fund is insufficient to cover such excess, the Developer shall be responsible for remitting any such anticipated shortfall to the City within ten (10) calendar days of City's determination of the same and notice to Developer, and

such amount shall be deposited by City into the Contingency Fund for use pursuant to the terms of this Agreement.

(vii) The Developer and the City acknowledge that in no event shall the City's costs (whether in the form of out-of-pocket payments, waivers of fees and charges, allocations of costs of services provided by staff and resources of the City, or otherwise) with respect to the City Obligations exceed \$4,000,000 plus the amount of City Caused Overruns, if any. If, during the development and construction of the City Work or the performance of the other City Obligations, the City ever actually incurs Excess City Costs for which Developer is responsible under this Agreement (i.e., Excess City Costs that are not City Caused Overruns) and the amount then held in the Contingency Fund is insufficient to cover such excess, the Developer shall be responsible for remitting the amount of such Excess City Costs (less any amount used by the City from the Contingency Fund for such costs) to City for City's direct payment of the same pursuant to the provisions of Section 2.5(b) hereof. To the extent the City has remaining obligations with respect to the City Obligations to be paid thereafter, then Developer shall continue to be responsible for the replenishment of the balance of the Contingency Fund to an amount to cover any remaining reasonably expected Excess City Costs pursuant to Section 2.5(c)(vi) hereof.

(viii) Upon completion of the City Obligations and full payment therefor (by City or Developer, as required under this Agreement), to the extent there remains any unused funds in the Contingency Fund (including any interest earned thereon), the same shall be promptly delivered by City to the Developer.

(d) The Developer acknowledges that, in the event the City determines that an easement on real property to which title is owned by the Developer or any Affiliate thereof is necessary to enable the City to commence or proceed with the City Work, the Developer shall grant such easement to the City for such purpose, all at no cost to the City.

(e) The City agrees that, upon reasonable notice, it shall provide to the Developer a reasonable accounting of the City's expenditures for the City Obligations up to \$4,000,000 and all invoices or other supporting documentation related to any Excess City Costs.

(f) Notwithstanding anything to the contrary hereinabove, Developer shall not be responsible for any Excess City Costs that are the direct result of mistakes in work being performed directly by City employees resulting in additional costs or expenses for the City Work (herein, the "City Caused Overruns"). Developer shall bear the burden of establishing that any Excess City Costs are the result of City Caused Overruns under this Agreement.

(g) The City agrees to complete the City Work on or before July 1, 2013; provided, that upon failure of the City to complete the City Work by such date, Developer's sole and exclusive remedy in such event shall be specific performance, and the Developer shall not be entitled to any other damages whatsoever, including, without limitation, incidental or consequential damages, whether arising at law or in equity; and, provided further, that neither any failure by the City to complete the City Work on or before July 1, 2013, as aforesaid, nor the

pursuit by Developer of any decree for specific performance as the sole and exclusive remedy for such failure, shall in any respect alter, extend, or modify any of the Developer's obligations hereunder, including, without limitation, the obligations of the Developer set forth in Sections 2.5, 4.2, 4.3, and 7.1 hereof.

2.6 Aid to Construction. The City hereby agrees to cover or cause to be waived Aid-to-Construction fees and similar assessments ("ATC Charges") with respect to the initial supplying of utilities to Phase III as a whole. Anything in the foregoing to the contrary notwithstanding, whether express or implied, ATC Charges shall not include standard utility meter fees or any point-of-service fees or assessments (for which Developer and any of its tenants, lessees, successors or assigns shall be fully responsible).

2.7 Clay Liner. To the extent that Developer's development of Phase III involves removal of the existing clay liner (the "Clay Liner") of the Site Lake (or any portions thereof), at such time as the Developer shall have removed the same from the Site Lake, placed it in an area where the City can reasonably obtain access thereto for purposes of removing the same, and notified the City that such portion of the Clay Liner is available for pick up by the City, the City agrees to pick up and transport the same from the Project. Except for the pick up and transporting under the conditions set forth above, under no circumstances shall the City be obligated to remove or otherwise relocate, or pay the costs in removing or otherwise relocating, the Clay Liner from the Site Lake.

ARTICLE III REPRESENTATIONS AND WARRANTIES

3.1 Representations and Warranties of the City.

(a) The execution and delivery of this Agreement by the City have been duly authorized by the City Council of the City.

(b) The City has all right, power and authority to enter into the transactions contemplated by this Agreement and to perform its obligations hereunder.

3.2 Representations and Warranties of Developer.

(a) The execution and delivery of this Agreement by Developer has been duly authorized by all necessary action on the part of the governing body of the Developer and Developer's members and managers, if any.

(b) Developer has all necessary power and authority to enter into the transactions contemplated by this Agreement and, to the extent applicable, to perform its obligations hereunder.

ARTICLE IV THE PHASES

4.1 Development of the Phases. The Developer hereby agrees, with and for the benefit of the City, as follows:

(a) The Developer will develop Phase III in accordance with the terms and conditions of this Agreement, and any development of Phase IV during the Phase IV Covenant Term shall be in accordance with the Phase IV Site Development Covenants.

(b) Developer agrees to use all commercially reasonable efforts to commence and complete the development of Phase III as promptly as possible following the Effective Date and to comply with all Laws including, without limitation, all City Regulations applicable to the construction, development, and operation of the Phases and the Project.

4.2 Phase III. (a) Completion of Phase III of the Project shall require the following:

(i) Construction of a department store with a minimum total square footage area of approximately 170,000 square feet (but in no event less than 168,000 square feet), and leased to a national or regional department store retailer pursuant to the Department Store Lease Agreement, to be located in the Phase III Site (the "Department Store"), which such Department Store must open to the public for business for a minimum of one (1) day on or prior to March 31, 2015;

(ii) Construction of additional out parcels or other spaces for retail shop space with a minimum of 45,000 square feet of space in the aggregate, as evidenced by a Certificate of Substantial Completion; and

(iii) Construction of, and the occupancy or execution of a binding lease agreement by, one (1) restaurant of a sit-down dining type, and containing a minimum of 6,000 square feet of space (the "Restaurant"). The Restaurant must be a brand or type not located within Madison County, Alabama, at the time of such occupancy or lease agreement execution. The Restaurant can be included in the 45,000 square feet of retail space set out in Paragraph 4.2(a)(ii) above, and in such event the total minimum square footage requirement of Phase III (inclusive of the Department Store) shall be 213,000 square feet.

(b) Phase III shall be completed in accordance with the requirements of Section 4.2(a) on or before March 31, 2015. During construction of Phase III and of the City Work, the City will not prohibit the Developer from utilizing existing public infrastructure (including, without limitation, existing storm water collection and diffusion infrastructure) on or around the site of the Project for the purpose of draining and filling that portion of the Site Lake located on the Western Portion of the Site Lake. Any drainage or filling of any other portion of the Site Lake shall be subject to approval by the City and the findings, results or recommendations of any hydrologic studies or assessments conducted during performance of the City Work.

(c) If, for whatever reason, Phase III is not completed on or before March 31, 2015, then, in addition to all other rights and remedies of the City hereunder, the Developer shall be required to remit and pay to the City, in immediately available funds, an amount equal to the total amount paid to such date by the City for the City Obligations not already reimbursed by Developer, including all costs (whether out-of-pocket payments, waivers of fees and charges, allocations of costs of services provided by staff and resources of the City, or otherwise) of the City in connection with such obligations (the "Phase III Completion Damages Amount"). Anything in the foregoing notwithstanding, the City shall be authorized to draw, retain, and use for any purpose of the City the full amount available for drawing under the Letter of Credit (or, if the City has already drawn on the Letter of Credit pursuant to Section 7.2(b) hereof, all proceeds from such drawing) upon failure of the Developer, for whatever reason, to timely complete Phase III on or before March 31, 2015, whether or not the Phase III Completion Damages Amount is less than the full amount available under the Letter of Credit (which shall be the amount the City will be drawing on the Letter of Credit) or the amount theretofore drawn under the Letter of Credit pursuant to Section 7.2(b) hereof. Amounts drawn under the Letter of Credit shall be applied as a credit towards the Phase III Completion Damages Amount, and any amount drawn under the Letter of Credit in excess of the Phase III Completion Damages Amount shall be retained by and become funds of the City and used for any purpose determined by the City.

(d) Upon failure of the Developer to timely complete Phase III in accordance with this Agreement, the City shall have no further obligations hereunder.

4.3 Phase IV Site Development Covenants. (a) The Developer hereby covenants and agrees that, during the Phase IV Covenant Term, any future development of the Phase IV Site will include construction at a minimum of either (i) a hotel consisting of at least 100 rooms, or (ii) 50,000 square feet of retail space; and, further, that under no circumstances shall any Phase IV Site development during the Phase IV Covenant Term include any office space improvements (other than such as may be incident to the operation of the hotel and/or retail improvements on the Phase IV Site).

(b) The Developer understands, acknowledges and agrees that the agreements regarding the requirements and limitations upon any development of the Phase IV Site set forth in subparagraph (a) immediately above (herein called the "Phase IV Site Development Restrictions") are a material inducement to the City in entering into this Agreement. In order to ensure performance of the Phase IV Site Development Restrictions, the Developer shall be responsible for preparing, developing, imposing, and recording covenants on the Phase IV Site requiring that all owners of property within the Phase IV Site construct and develop improvements thereon solely in accordance with the Phase IV Site Development Restrictions and naming the City as a third party beneficiary thereof (the "Phase IV Site Development Covenants"). The Phase IV Site Development Covenants shall have a term of not less than thirty (30) years from the date of recordation thereof (herein called the "Phase IV Covenant Term").

(c) The Phase IV Site Development Covenants shall be of the form and content reasonably satisfactory to the City, and shall be submitted to the City for approval (such approval to be made by the Manager of Planning Administration for the City) prior to the recordation thereof. The Phase IV Site Development Covenants shall be recorded as and when required pursuant to Section 2.5(c)(iii) hereof.

(d) The Developer agrees that any development by Developer of Phase IV during the Phase IV Covenant Term shall be in compliance with the Phase IV Site Development Covenants. The parties hereto agree, however, except for the immediately preceding sentence, nothing in this Agreement shall create or constitute any obligation or commitment of any kind regarding any future development of Phase IV by Developer, and that upon expiration of the Phase IV Covenant Term, there shall remain no Phase IV Site Development Restrictions.

(e) Notwithstanding anything to the contrary contained herein, the parties agree that the Phase IV Site Development Covenants will permit Developer, in the absence of any vertical construction on the Phase IV Site (which such vertical construction shall at all times be subject to the requirements of Section 4.3(a) hereof), at any time in its sole discretion, to utilize the Phase IV Site for additional surface parking for the Project.

ARTICLE V
[RESERVED]

ARTICLE VI
ARCHITECTURE, ENGINEERING AND
DESIGN REVIEW PROCESS GOVERNING
THE PHASES

6.1 Certain Matters Relating to Zoning and City Regulations. (a) Except as otherwise specifically provided in this Agreement, and provided that construction of Phase III is commenced within the time period required under this Agreement, then during the period of five (5) years after the Effective Date: (i) the regulations and standards in the Zoning Ordinance that are applicable to the Project shall be deemed vested on behalf of Developer; and (ii) the City shall not impose on or apply to the overall design, development or construction of the Phases, any City Regulations which would:

(i) be inconsistent or in conflict with the intent, purposes, terms, standards or conditions of this Agreement;

(ii) change or modify the provisions of the City Regulations in effect on the Effective Date governing the permitted uses of the Project, the density or intensity of use of any Phase of the Project, the maximum height, bulk, or size of proposed buildings and improvements in the Project, the minimum setbacks for any buildings and improvements in the Project and the parking requirements for the Project;

(iii) increase the cost of development of a Phase;

(iv) other than to a *de minimis* extent, change, modify or delay, or interfere with, the timing, phasing, or rate of development of either Phase; or

(v) interfere with or diminish the ability of a party to perform its obligations under this Agreement, or expand, enlarge or accelerate Developer's obligations under this Agreement.

(b) Nothing in this Agreement is intended, should be construed or shall operate to preclude or otherwise impair the rights of Developer from applying to the City's Board of Zoning Adjustment for a variance or exception under the Zoning Ordinance with respect to any proposed buildings and improvements in its respective portion of the Project (collectively, the "Variances") in accordance with the procedures applicable to Variances under the City Regulations then in effect. The City shall process, review and approve or disapprove any application for a Variance filed by a Developer in accordance with such City Regulations.

6.2 Exceptions. Any other provision of Section 6.1 to the contrary notwithstanding:

(a) the City shall have the right to apply to the Project, or any portion thereof, at any time, as a ministerial act, the Construction Codes and Standards in effect at the time of the requirement of any City Approval hereunder; provided that such Construction Codes and Standards are uniformly applied by the City to comparable construction activity on a City-wide basis; and

(b) the Developer shall pay City Application Fees that are in effect at the time the relevant application for a City Approval is made, provided that such City Application Fees are uniformly imposed by the City at similar stages of project development on all similar applications for development in the City.

6.3 Project Approvals. As soon as practicable following the delivery to the City of final plans and specifications for the construction projects included in Phase III, the City will prepare and provide to Developer a list of all City Approvals that shall be required for the development, construction, use and occupancy of the each component of such Phase (collectively, the "Project Approvals").

6.4 Project Exactions. Except as specifically set forth in this Agreement, no Exactions shall be imposed by the City on either Phase, or on any application made by Developer for any City Approval, or in enacting any City Approval, or in connection with the development, construction, use or occupancy of any Phase or the Project, other than the City's sewer access fee and any other general fees or charges of the City that are uniformly imposed by the City on similar applications for development in the City.

6.5 City Development Fees. Within 45 days following delivery to the City of the plans and specifications for the construction and development of Phase III, the City will prepare and provide to Developer a list of all City Development Fees that, based on such plans and specifications, will be required for the development, construction, use and occupancy of such Phase.

6.6 Review and Processing of Project Approvals. All City Approvals required for the construction and development of Phase III or any buildings and improvements therein which

comply with the requirements of the City Regulations: (a) shall be issued over-the-counter by the director of the other applicable City departments having responsibility for the issuance of such City Approvals; (b) shall not require the approval of the Planning Commission, City Council or any other City board or commission, including without limitation, the DCC; and (c) shall not require a public hearing. The City Approvals covered under this Section 6.6 include but are not limited to, Technical City Permits, building permits and certificates of occupancy and completion. The City shall cooperate with the Developer in an effort to facilitate prompt and timely review and processing of all applications for City Approvals, including the timely processing and checking of all maps, plans, permits, building plans and specifications and other plans relating to development of the Phases filed by the Developer.

6.7 Project Signage. The Developer may provide, at its sole cost and expense, signage for the Project that is permitted in the City Regulations.

6.8 Governmental Agency Approvals. Developer shall apply for and pursue all required Governmental Agency Approvals from Governmental Agencies which are required during the course of design, development, construction, use or occupancy of the Phases. Developer shall take such reasonable steps as are necessary to obtain all such Governmental Agency Approvals and shall bear all costs and expenses for obtaining such Governmental Agency Approvals. When and if obtained, copies of all such Governmental Agency Approvals shall be submitted to the City promptly after a Developer's receipt of a written request therefore from the City. Developer shall comply with, and shall cause each Phase to comply with, all Governmental Agency Regulations and Laws related to the development, use and operation of the Project.

ARTICLE VII LETTER OF CREDIT

7.1 Developer to Provide Letter of Credit. (a) In order, among other things, to secure its obligations to the City hereunder, the Developer shall deliver to the City an unconditional, irrevocable standby letter of credit in favor of the City in the face amount of \$4,000,000 and containing such terms and conditions as shall be reasonably acceptable to the City (including, without limitation, provisions permitting the City to make drawings under the letter of credit up to the maximum amount available thereunder from time to time and at any time (the "Letter of Credit"), subject to reduction of the face amount as provided for in paragraph (b) of this Section 7.1. Without limiting the generality of the foregoing, the Letter of Credit shall be from an issuer reasonably acceptable to the City and (i) be for an initial term of at least one (1) year, with automatic renewal features of not less than one (1) year each to occur immediately and without further actions of the issuer of the Letter of Credit in the event the issuer fails to notify the City in writing at least forty-five (45) days prior to the expiration of the then current term of the Letter of Credit of the issuer's determination not to renew the Letter of Credit for an additional renewal period, (ii) provide for unconditional payment upon presentment within the City of Huntsville, Alabama, and (iii) expressly permit each of the Mayor and the City Clerk/Treasurer to act on behalf of the City for purposes of making drawings thereunder. The Developer shall cause the Letter of Credit to be outstanding and available until the Termination of this Agreement pursuant to Section 9.1 or 9.2 hereof.

(b) The Letter of Credit shall at all times be in the face amount of, and permit one or more drawings up to, \$4,000,000; provided, that at such time as the Developer has caused to be poured and completed the foundation and all footings for all Phase III buildings (the completion of which shall be evidenced by a certificate signed by an authorized representative of the Developer and confirmed in writing by the City) the Developer may cause the issuer of the Letter of Credit to reduce the face amount of the Letter of Credit to \$2,000,000.

(c) Anything in this Section 7.1 notwithstanding, the City shall return the Letter of Credit to the Developer for cancellation upon the Termination of this Agreement pursuant to Section 9.1 or 9.2 hereof, but only in the event the City has not fully drawn upon the same.

7.2 Draws Against the Letter of Credit. (a) The City and Developer hereby agree that the City will not make any drawing under the Letter of Credit (except a drawing to be made if the issuer of the Letter of Credit indicates to the City of such issuer's intention or decision not to renew the same while this Agreement is in effect, a drawing made following a downgrade or reduction of the short-term or long-term credit rating of the issuer of the Letter of Credit beyond a level reasonably acceptable to the City by any entity maintaining a rating on the issuer of the Letter of Credit, or a drawing to be made pursuant to Section 4.2(c) following failure of the Developer to timely complete Phase III as set forth in this Agreement on or before March 31, 2015, in all of which cases the Developer understands the City may make drawings on the Letter of Credit immediately and without further notice to or cure rights of the Developer) until the expiration of a notice and a reasonable cure period that in no event shall exceed thirty (30) days. After the expiration of such notice and cure period, the City shall have the right, but not the obligation, to make one or more drawings against the Letter of Credit up to the full amount available for drawing thereunder upon failure of Developer to perform any of its obligations to the City under this Agreement including, without limitation, the obligation of Developer to make the Developer City Work Prepayment Amount and any other payments required of the Developer respecting the development, construction and performance of the City Obligations, and the obligation of the Developer to record the Phase IV Site Development Covenants as herein set forth. All proceeds from drawings on the Letter of Credit shall be retained by the City, whether or not the amount owed hereunder to the City by the Developer is less than the amount drawn by the City under the Letter of Credit, and may be used by the City for any purpose determined by the City.

(b) It is hereby further understood and agreed that the City may, but shall not be required to, withdraw the full amount available under the Letter of Credit upon notice from the issuer of the Letter of Credit then in effect of such issuer's decision not to renew the Letter of Credit for an additional one (1) year term or in the event of a downgrade or reduction of the short-term or long-term credit rating of the issuer of the Letter of Credit beyond a level reasonably acceptable to the City by any entity maintaining a rating on the issuer of the Letter of Credit, which such amount shall be held by the City outside the Contingency Fund to secure the obligations of the Developer to the City hereunder (including, without limitation, the obligations of Developer to make the payments required of the Developer respecting the development and construction of the City Work, and to make the other payments called for pursuant to Section 4.2(c) hereof and to timely complete Phase III as herein set forth). Without limiting the foregoing in any respect, upon termination of this Agreement, any funds so held by the City (exclusive of interest or earnings thereon) as a result of a drawing on the Letter of Credit

pursuant to this paragraph (b), and not otherwise applied to satisfaction of payments required of the Developer under this Agreement as aforesaid or that have not become the funds or property of the City pursuant to any other provisions of this Agreement, shall be returned to the Developer within ten (10) business days.

ARTICLE VIII RESERVED

ARTICLE IX TERM AND TERMINATION

9.1 Term. This Agreement, upon its execution and delivery by all parties thereto, shall become effective on the Effective Date and shall continue in effect until all payment and performance obligations of the Parties required under this Agreement have been fully performed and discharged.

9.2 Termination. This Agreement may be Terminated by the unanimous written consent of all parties to this Agreement, at any time prior to completion of the development of Phase III.

9.3 Effect of Termination. Upon any Termination of this Agreement in accordance with its terms, all obligations of the parties hereunder will terminate, except (a) the obligation of the Developer respecting the Phase IV Site Development Covenants, and (b) any obligations expressly stated herein to survive Termination of this Agreement; all of which such obligations shall survive such Termination and shall be fulfilled by the party obligated thereunder. In addition, termination of this Agreement in accordance with its terms shall not: (a) alter, impair or otherwise affect any City Approvals for the Project that were issued by the City prior to the date of Termination; or (b) prevent, impair or delay the Developer from (i) commencing, performing or completing the construction of any buildings or improvements in the Phases or (ii) obtaining any certificates or occupancy or similar approvals from the City for the use and occupancy of completed buildings or improvements in either Phase, that were authorized pursuant to City Approvals for such construction issued by the City prior to the date of Termination. Nothing herein shall preclude the City, in its discretion, from taking any action authorized by Laws or City Regulations to prevent, stop or correct any violation of Laws or City Regulations occurring before, during or after construction of the buildings and improvements in the Project by Developer.

ARTICLE X ASSIGNMENT AND TRANSFER

10.1 Restrictions on Assignment; Conditions Precedent. Except as otherwise expressly set forth in this Article X, Developer shall not have the right to assign or otherwise Transfer its rights or obligations under this Agreement, and any purported assignment, Transfer, encumbrance or hypothecation of this Agreement or any of the rights or obligations hereunder in violation of this Article X shall be void. Notwithstanding the foregoing, if, and to the extent, permitted herein, Developer may Transfer its rights under this Agreement only upon the satisfaction of each of the following conditions precedent:

(a) The Developer shall be in compliance with all of its obligations hereunder as of the effective date of the proposed assignment.

(b) The proposed Transferee shall be subject to the City's approval pursuant to Section 10.3 hereof.

(c) Prior to the effective date of the proposed Transfer, the Developer and proposed Transferee have delivered to the City an executed and acknowledged assignment and assumption agreement ("Assumption Agreement") in recordable form. Such Assumption Agreement shall include provisions regarding: (a) the rights and interest proposed to be Transferred to the proposed Transferee; (b) the obligations of the Developer under this Agreement that the proposed Transferee will assume; and (c) the proposed Transferee's acknowledgment that such Transferee has reviewed and agrees to be bound by this Agreement. The Assumption Agreement shall also include the name, form of entity, and address of the proposed Transferee, and shall provide that the Transferee assumes the obligations of the assigning Developer to be assumed by the Transferee in connection with the proposed Transfer. The Assumption Agreement shall be recorded in the Office of the Judge of Probate of Madison County concurrently with the consummation of the Transfer.

10.2 Transfer to Affiliate. Notwithstanding any restrictions on Transfers set forth in Section 10.1 above, Developer may at any time Transfer all of its rights, duties and obligations under this Agreement to an Affiliate of Developer; provided, that (i) the Developer shall provide at least five (5) business days advance Notice of such Transfer to the City, and (ii) unless the City agrees in writing to the contrary, no such Transfer shall, or shall be deemed to, release the Transferring Developer from its obligations hereunder and such Developer shall be responsible for the satisfaction of the remaining obligations hereunder. Such Affiliate shall become a Permitted Transferee upon: (a) delivery to the City of an Assumption Agreement pursuant to Section 10.1 hereof assuming, from and after the date such Affiliate acquires its interest, the applicable rights, duties and obligations of the Transferring Developer under this Agreement, and (b) unless the prior written consent of the City to the contrary is first obtained, the Developer acknowledges in writing its continued responsibility for the full and timely performance of all of its obligations hereunder by such Affiliate.

10.3 Consent of City Required. Unless the proposed Transferee is an Affiliate of a Developer and the parties comply with Section 10.2 hereof, Developer may not assign or otherwise Transfer all or any portion of its rights or obligations under this Agreement to any Person without the prior written consent of the City, which shall not be unreasonably withheld, conditioned or delayed. In addition, and not in limitation of the foregoing, the Developer hereby agrees that, during the period commencing on the Effective Date and concluding on the date upon which Phase III has been completed (as evidenced by a Certificate of Substantial Completion for all Phase III buildings), Developer shall not sell, transfer or otherwise convey its ownership interest in the Phase III to any Person (other than an Affiliate, subject to the provisions of Section 10.2 above) without the express written consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed; provided, that the prior consent of the City shall not be required for (a) the granting of a Mortgage on or with respect to any Phase, or (b) the collateral assignment of the Developer's rights under this Agreement in order to finance such development or construction costs with respect to any Phase.

ARTICLE XI
NOTICES

11.1 Delivery of Notices. All notices, statements, demands, consents and other communications ("Notices") required or permitted to be given by any party to another party pursuant to this Agreement or pursuant to any applicable law or requirement of public authority shall be properly given only if the Notice is: (a) made in writing (whether or not so stated elsewhere in this Agreement); (b) given by one of the methods prescribed in Section 11.2; and (c) sent to the party to which it is addressed at the address set forth below or at such other address as such party may hereafter specify by at least five (5) calendar days' prior written notice:

If to the City:	City of Huntsville Attention: Mayor 308 Fountain Circle P.O. Box 308 Huntsville, Alabama 35804 Fax: (256) 427-5121
With a copy to the attention of:	City of Huntsville Attention: City Attorney 308 Fountain Circle P.O. Box 308 Huntsville, Alabama 35804
If to Developer:	IMI Huntsville, LLC c/o Miller Capital Advisory, Inc. 5750 Old Orchard Road, Suite 400 Skokie, Illinois 60077 Attention: Mr. Richard Kobe Fax: (847) 966-9628
with a copy to:	Jason M. Toon, Esq. Greenberg Traurig, LLP 77 West Wacker Drive Suite 3100 Chicago, Illinois 60601 Fax: (312) 899-0427

11.2 Methods of Delivery. Notices may be either: (a) delivered by hand; (b) delivered by a nationally recognized overnight courier which maintains evidence of receipt; or (c) sent by facsimile transmission with a confirmation copy delivered the following day by a nationally recognized overnight courier which maintains evidence of receipt. Notices shall be effective on the date of receipt. If any Notice is not received or cannot be delivered due to a change in address of the receiving party, of which notice was not properly given to the sending party, or

due to a refusal to accept by the receiving party, such Notice shall be effective on the date delivery is attempted.

ARTICLE XII **MISCELLANEOUS**

12.1 **Negation of Partnership.** The parties specifically acknowledge that none of the parties is acting as the agent of the other in any respect hereunder, and that each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement. None of the terms or provisions of this Agreement shall be deemed to create a partnership or joint venture between or among any two or more of the parties, or cause them to be considered joint venturers or members of any joint enterprise. This Agreement is not intended and shall not be construed to create any third party beneficiary rights in any Person who is not a party or a Permitted Transferee; and nothing in this Agreement shall limit or waive any rights any one or more of the parties may have or acquire against any third Person with respect to the terms, covenants or conditions of this Agreement.

12.2 **Approvals.** Unless otherwise provided in this Agreement, whenever approval, consent, satisfaction, or decision (herein collectively referred to as an "**Approval**"), is required of a party pursuant to this Agreement, it shall not be unreasonably withheld or delayed. If a party shall disapprove, the reasons therefore shall be stated in reasonable detail in writing. Approval by a party to or of any act or request by the other party shall not be deemed to waive or render unnecessary approval to or of any similar or subsequent acts or requests. Whenever, under this Agreement, the term "approve" (or any grammatical variant thereof, such as "approved" or "approval") is used in connection with the right, power or duty of the City, or any representative board, commission, committee or official of the City, to act in connection with any City Approval, such Approval shall be deemed conclusively given if (a) in writing and (b) the approval is made by the Mayor.

12.3 **Not A Public Dedication.** Except as specifically set forth in Section 2.5(d) hereof, nothing herein contained shall be deemed to be a gift or dedication of any of the real property described or referred to herein, or any buildings or improvements constructed thereon, to the general public, for the general public, or for any public use or purpose whatsoever.

12.4 **Severability.** Invalidity of any of the provisions contained in this Agreement, or of the application thereof to any Person, by judgment or court order, shall in no way affect any of the other provisions hereof or the application thereof to any other Person or circumstance and the same shall remain in full force and effect, unless enforcement of this Agreement as so invalidated would be unreasonable or grossly inequitable under all the circumstances or would frustrate the purposes of this Agreement.

12.5 **Exhibits.** The Exhibits, to which reference is made herein, are deemed incorporated into this Agreement in their entirety by reference thereto.

12.6 **Amendment.** Except as expressly provided in this Agreement, this Agreement may be modified or amended only by a written instrument, executed by each of the parties to this Agreement.

12.7 Entire Agreement. This written Agreement and the Exhibits hereto, contain all the representations and the entire agreement among the parties with respect to the subject matter hereof. Except as otherwise specified in this Agreement, any prior correspondence, memoranda, agreements, warranties or representations are superseded in total by this Agreement and Exhibits hereto. Neither the conduct nor actions of the parties, nor the course of dealing or other custom or practice between or among the parties or any of them, shall constitute a waiver or modification of any term or provision of this Agreement. This Agreement may be modified or amended only in the manner specified in this Agreement.

12.8 Construction of Agreement. All of the provisions of this Agreement have been negotiated at arm's-length between the parties and after advice by counsel and other representatives chosen by each party, and the parties are fully informed with respect thereto. Therefore, this Agreement shall not be construed for or against any party by reason of the authorship or alleged authorship of any provisions hereof, or by reason of the status of either party. The provisions of this Agreement and the Exhibits hereto shall be construed as a whole according to their common meaning and not strictly for or against any party and consistent with the provisions hereof, in order to achieve the objectives and purpose of the parties hereunder. The captions preceding the text of each Article and Section are included only for convenience of reference and shall be disregarded in the construction and interpretation of this Agreement.

12.9 Further Assurances; Covenant to Sign Documents. Each party shall take all actions and do all things, and execute, with acknowledgment or affidavit if required, any and all documents and writings, which may be necessary or proper to achieve the purposes and objectives of this Agreement.

12.10 Governing Law. This Agreement, and the rights and obligations of the parties, shall be governed by and interpreted in accordance with the laws of the State of Alabama.

12.11 Counterpart Execution. For convenience, this Agreement may be executed by the parties in multiple counterparts, each of which shall constitute an original, and all of which, when taken together, shall constitute one and the same Agreement.

12.12 Liabilities of the City. The Developer understands, acknowledges and agrees that the obligations of the City as set forth herein are limited by the limitations imposed on public bodies, municipalities and public corporations by the Constitution of the State of Alabama and laws affecting the use and maintenance of public property. Anything in this Agreement to the contrary notwithstanding, whether express or implied, in the event the City Work, or any portion thereof, is not constructed or otherwise operational by the date set forth in Section 2.5(g) hereof, or is designed or constructed in a manner not suitable to the Developer, the sole and exclusive remedy of the Developer shall be specific performance, and the Developer shall not be entitled to any other damages whatsoever, including, without limitation, incidental or consequential damages, whether arising at law or in equity.

12.13 No Representations or Warranties Concerning City Work. The Developer acknowledges and agrees that the City makes no and disclaims any and all representations and warranties regarding the City Work, including, without limitation, warranties (whether express or implied) regarding the design, construction, functionality, and suitability of the City Work. The

Developer further acknowledges and agrees that, pursuant to Article II hereof, it is obligated to review and approve the Plans and Specifications and IFBs regarding the City Work and that such review and approval shall forever estop Developer from asserting liability of the City for any claimed representations or warranties regarding the City Work.

IN WITNESS WHEREOF, each of the parties has caused this Agreement to be executed and delivered on its behalf by its duly authorized officer, on and as of the Effective Date.

CITY OF HUNTSVILLE

By

Mayor

ATTEST:

By _____

Its _____

IMI HUNTSVILLE, LLC

a Delaware limited liability company

By: Institutional Mall Investors, LLC,
a Delaware limited liability company
Its Sole Member

By: Miller Capital Advisory, Inc.
an Illinois corporation
Its Manager

By: _____
Name: _____
Its: _____

EXHIBIT A

LEGAL DESCRIPTION FOR PHASE III SITE

[see attached]

EXHIBIT B

LEGAL DESCRIPTION FOR PHASE IV SITE

[see attached]

EXHIBIT C

CITY WORK DESCRIPTION

The City Work shall consist only of the following:

The development, design, and construction of a box culvert storm piping system serving the Project site and connected to the City's existing storm water collection system (the "Box Culvert System"), including all utility relocations or modifications, any other necessary modifications to public rights-of-way on the Project site, and any related permits, costs, fees and expenses relating to the City Work. The Box Culvert System shall be designed and constructed so as to eliminate the necessity, for storm water management purposes, of all or a portion of the approximately 11-acre lake presently located on the Project site (the "Site Lake").

